HOUSE COMMITTEE ON HOMELAND SECURITY
OPEN BORDERS, CLOSED CASE: SECRETARY MAYORKAS' DERELICTION OF DUTY ON THE BORDER CRISIS
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PREPARED TESTIMONY OF
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Chairman Green, Ranking Member Thompson, and distinguished members of this committee, thank you for the opportunity to present testimony regarding the ongoing crisis threatening the integrity of our immigration system.

As this committee investigates the actions and inaction of the Department of Homeland Security, the conclusion that the Administration and Department have failed to comply with the law, as written, and often times acted in contravention of the law, is inevitable. This Administration has seen fit to ignore the law, instead favoring poorly conceived and even more so poorly executed policy decisions. The actions through executive orders, departmental memos, and rules seemingly upend the Immigration and Nationality Act (INA) and congressional intent. These decisions, implemented at each immigration agency, have eroded this country's immigration system and have propelled the crisis to its current levels.

The sharp rise in unlawful entries and attempted entries along the southwest border provides a critical litmus test of the crisis' scope but is an outgrowth of Administration and Departmental actions. The focus on the overwhelming numbers does not, in and of itself, provide insight into the reasons for the crisis. Additionally, media often focuses on the border to the detriment of the other actions and inaction by Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS). Regardless of the specifics, it is plainly obvious that since President Biden was inaugurated in January 2021, this country has witnessed an unprecedented border crisis.

Executive Order and Memos

Beginning on Day 1 of the Biden Administration, the Department of Homeland Security's (DHS) Acting Secretary, David Pekoske, halted all deportations for 100 days.[1] This was predicated on interim enforcement priorities that the Department wanted ICE to implement. In its view, the only way to sufficiently update priorities was to reset the entire system by halting all

[1] Memo. from David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

enforcement actions. This was followed up by ICE Acting Director Tae Johnson's memo of February 18, 2021. This memo was the first step to implement the priorities and included reporting requirements for enforcement actions and the need to justify any action to superiors through a pre-approval process.[2]

At the White House, on February 2, 2021, President Biden issued his "Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans."[3] The order required DHS, in conjunction with the Department of Justice and the Department of State to "identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers."[4] This was followed with an executive order that, among other things, created the battle cry of the Administration – removing barriers to immigration.

To that end, on September 30, 2021, Secretary Alejandro Mayorkas issued a memorandum entitled "Guidelines for the Enforcement of Civil Immigration Law" which outlined the appropriate instances in which DHS was authorized to take action against aliens either unlawfully present or lawfully present but removable.[5] [6] Specifically, Secretary Mayorkas outlined three main buckets for removal – 1) threats national security; 2) threats to public safety; 3) threats to border security. While, in theory, this would seem to encompass many aliens who should properly be targeted for enforcement actions by ICE, in reality, the numerous carve-outs, loose definitions, and required factors for consideration make it nearly impossible to move forward with most enforcement actions. These poorly defined categories could be seen to give even the most serious of criminal aliens a free pass in the interest of equity and "justice."

On April 3, 2022, ICE's Principal Legal Advisor, Kerry Doyle, issued a memo on prosecutorial discretion, aligning ICE action in immigration court with the Mayorkas Memo.[7] The April Memo provided that ICE attorneys were to exercise prosecutorial discretion in cases that were not deemed priority cases. This could include dismissal as well as administrative closure (pausing the case indefinitely).

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[2] Memo. from Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), available at: https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf

[3] Exec. Order No. 14012, 86 Fed. Reg. 8277 (Feb. 5, 2021).

[4] *Id*.

[5] Memo. From Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), available at: https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

[6] On June 10, 2022, the U.S. District Court for the Southern District of Texas vacated this memorandum.

[7] Memo. from Kerry E. Doyle, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022), available at: https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

These memos all seek to redefine immigration enforcement by creating fictional priorities with no basis in law. Neither the INA's section on inadmissibility nor its section on removability suggest a prioritization of grounds for enforcement. Instead, it enumerates a list of grounds of inadmissibility and removability that the Department of Homeland Security is required to enforce. Its failure to do so in the name of prosecutorial discretion is a dereliction of duty and cannot be permitted to continue.

Prosecutorial discretion is a critical tool for any police or prosecuting agency, when used correctly. The Supreme Court has even upheld such measures. Writing for the Court, Justice Scalia found that a "…well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."[8] In interpreting "seemingly mandatory legislative commands," the Court found that the there exists a "deep-rooted nature of law enforcement discretion…"[9] However, that discretion is not absolute and cannot replace whole statutory text. Prosecutorial discretion should be viewed in the context of a case-by-case analysis in an individual matter. The use of prosecutorial discretion to exempt an entire class of individuals from law enforcement action, as is suggested in these memos, is not discretion at all.

The results of these memos speak for themselves. In Fiscal Year 2022, ICE recorded a little more than 72,000 alien removals from the United States.[10] While that may appear to be large number, the Executive Office for Immigration Review (the immigration courts) reports that in just the first quarter of 2023, immigration judges have ordered almost 47,000 people removed and have affirmed credible or reasonable fear denials in more than 4,000 matters.[11]

During the period that these memos were in effect, and beyond, the number of encounters along the southwest border steadily climbed. In Fiscal Year 2022, U.S. Customs and Border Protection (CBP) recorded a staggering and unprecedent 2,378,944 encounters.[12] Thus far in Fiscal Year 2023, CBP has already recorded 1,431964 encounters as of the end of April.[13] These are just the known and reported numbers and do not account for the thousands of "got aways" who were able to elude Border Patrol agents.

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[8] *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005).
[9] *Id*. at 761 (citing *Chicago v. Morales*, 527 U.S. 41 (1999)).
[10] U.S. Immig. and Customs Enforcement, *ICE releases FY 2022 annual report* (Dec. 30, 2022), available at: https://www.ice.gov/news/releases/ice-releases-fy-2022-annual-report.
[11] Exec. Off. For Immig. Review, *FY2023 First Quarter Decision Outcomes* (Jan. 16, 2023), available at: https://www.justice.gov/eoir/page/file/1105111/download.
[12] U.S. Customs and Border Protection, *Southwest Land Border Encounters* (May 17, 2023), available at: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.
[13] *Id*.

The numbers simply do not add up and even with the bulk of the Mayorkas and Doyle memos not in effect, the result is still lopsided enforcement compared to the record number of aliens entering.

The Regulations

Under the guise of removing barriers, the Department, along with the Department of Justice, engaged in several rulemakings purportedly aimed at creating efficiency and expediency at the border.

Under section 235(b)(1) of the Immigration and Nationality Act (INA)[14], aliens apprehended by CBP entering illegally along the border or without proper documents at the ports of entry are subject to "expedited removal", meaning that they can be quickly removed without receiving removal orders from an immigration judge (IJ).

If an arriving alien claims to fear harm or asks for asylum, however, CBP must hand the alien over to an asylum officer (AO) in U.S. Citizenship and Immigration Services (USCIS) for a "credible fear" interview.[15] Credible fear is a screening process to assess whether the alien may have an asylum claim, and thus proving credible fear is easier than establishing eligibility for asylum.[16] If an AO finds that the alien does not have credible fear (makes a "negative credible fear determination"), the alien can ask for a review of that decision by an IJ.[17] If the IJ upholds the negative credible fear determination, the alien is to be removed immediately.

When an AO or IJ makes a "positive credible fear determination", on the other hand, the alien is placed into removal proceedings to apply for asylum before an IJ.[18] Most aliens who have claimed a fear of return in the past received a positive credible fear assessment (83 percent between FY 2008 and FY 2019)[19], but less than 17 percent of those who received a positive credible fear assessment were ultimately granted asylum.[20]

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[14] Section 235(b)(1) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[15] Section 235(b)(1)(A)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[16] *See* section 235(b)(1)(B)(v) of the INA (defining "Credible fear of persecution"), *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[17] Section 235(b)(1)(B)(iii)(III) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[18] Section 235(b)(1)(B)(ii) of the INA, *available at*: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1225&num=0&edition=prelim.
[19] Credible Fear and Asylum Process: Fiscal Year (FY) 2008 – FY 2019, U.S. Dep't of Justice, Executive Office for Immigration Review (generated Oct. 23, 2019), *available at*: https://www.justice.gov/eoir/file/1216991/download.
[20] *Id*.

In 2022, DHS issued an interim final rule entitled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers."[21] Under the new process, a positive credible fear determination by a DHS asylum officer will lead to a non-adversarial asylum interview before another DHS asylum officer. Asylum officers who find an alien eligible for a form of protection lesser than full-fledged asylum, such as statutory withholding of removal[22] or protection under the Convention Against Torture[23], must still refer the matter to a DOJ immigration judge who may consider the entire case. That is hardly streamlining the process.

Even more concerning was that the written summary of the original credible fear interview doubles as an alien's asylum application, rendering the requirement that an alien file an asylum application moot. This shifts the burden to present and prepare a meritorious claim for protection. Aliens may rely on first-made claims of their story, changing or including relevant details in advance of the asylum interview or court proceeding, but without having to affirmatively file an application. While this, in and of itself, does not ensure an asylum grant, it certainly provides a path for fraud. It also renders a key anti-asylum fraud measure moot.

In addition to the practical problems associated with this rule, it impermissibly shifts authorities from the Department of Justice to the Department of Homeland Security. As Congress was creating the new DHS, it specifically determined which functions would be enumerated. [24] Regarding asylum officers, or USCIS in general, Congress specified which immigration functions would be transferred to the new created department.[25] Section 451 of the HSA established the Bureau of Citizenship and Immigration Services and provided its function as transferred from the DOJ.[26] By including a catchall provision for any functions that

[21] Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (Interim Final Rule Mar. 29, 2022) (to be codified at 8 C.F.R. parts 208, 212, 235, 1003, 1208, 1235, and 1240).

[22] Statutory withholding of removal specifies that an alien may not be removed "to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

[23] Following the U.S. ratifying its signing of the Convention Against Torture in 1994, Congress implemented CAT protections in Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 aimed at not effecting the removal of a person who would be subjected to torture upon such removal. *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. 105-277, Div. G, Tit. XII, chap. 3, subchap. B, section 2242(a) (1998).

[24] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[25] *Id*.

[26] *Id*. at §451(b), 116 Stat. 2135, 2196 (2002). ("(b) Transfer of Functions from the Commissioner. – In accordance with title XV (relating to transition provisions), there are transferred from the Commissioner of Immigration and Naturalization Services the following functions and all personnel, infrastructure, and funding provided to the Commissioner in support of such functions immediately before the effective date specified in section 455:

may have been missed in the paragraphs 1 through 4, it is apparent that the intent was to ensure that whatever adjudicative functions were being performed by INS prior to the transfer, would be continued by USCIS subsequent to it. Nothing in the provision suggests that any further functions be transferred.

As additional evidence that EOIR functions were not transferred, the HSA affirmatively established EOIR within DOJ. This section, ultimately codified in INA, states:

> (1) *In general.* – The Attorney General shall have such authorities and functions under this Act and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.[27][28]

This provision makes clear that the Attorney General retained the functions of EOIR to include the authority to order deportation from the United States. Nowhere in the HSA nor in the INA is there any reference to USCIS, exercising authority to order removal. As the former INS did not exercise such authority, and no such functions were specifically transferred to USCIS, the statute is not ambiguous or silent on the matter. Congressional intent is clear that such quasi-judicial functions would remain with EOIR where such functions have been exercised exclusively since 1983.

Accordingly, DHS, through USCIS, now taking on additional authorities aimed at processing in aliens faster and getting them full-fledged asylum interview, in a non-adversarial manner, without the benefit of immigration court or ICE trial attorney's input. This is rulemaking run amok as it is contrary to statute, contrary to long-existing policy, and directly encroaches on the Department of Justice.

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(1) Adjudications of immigrant visa petitions.
(2) Adjudications of naturalization petitions.
(3) Adjudications of asylum and refugee applications.
(4) Adjudications performed at service centers.
(5) All other adjudications performed by the Immigration and Naturalization Service immediately before the effective date specified in section 455.")

[27] 8 U.S.C. 1103(g).

[28] The Immigration Reform, Accountability and Security Enhancement Act of 2002 (S. 2444; 107th Cong.) was introduced in May of 2002 but was never passed. This language was retained for the Homeland Security Act of 2002, Pub. L. No. 107-296, § 1102, 116 Stat. 2135, 2273-2274 (2002).

Relevant to the border, a notice of proposed rulemaking was published on February 23, 2023.[29] Starting with the name, "Circumvention of Lawful Pathways," the proposed role is an ineffective measure and empty gesture. Despite its perceived enforcement provisions, this rule, if implemented, would allow most aliens to arrive at or between ports of entry, make fraudulent claims of fear to enter the U.S. or continue to utilize unlawful mass parole programs to accomplish the same. As the Biden Administration continues to steadfastly grip to its executive order on removing barriers to immigration,[30] this rule, finalized on May 16, 2023 will do exactly that.[31]

The rule may be framed as an enforcement tool to limit the number of aliens who will ultimately be able to receive asylum, however we are hard-pressed to find any examples of classes of aliens who will actually be kept out of the process under this rule.

The crux of the rule is the concept that a presumption of asylum ineligibility exists for any alien entering the United States who does not meet certain criteria. Specifically, the proposed rule requires that to be eligible for asylum one of three criteria must be met: (1) the alien must have appropriate documentation; (2) must present at a port of entry with a prescheduled appointment through the CBP ONE App; or (3) must have sought protection in a third country and received a final determination. The last criteria is akin to the Third Country Transit Rule, which likewise largely prohibited asylum eligibility for a non-contiguous alien who did not apply for protection in a country where such processes are available.[32]

The similarities to the previous rule end there, however. While this appears to be a strong measure to control migration along the southern border, it becomes apparent that the exceptions swallow the rule. We are left with the question of to whom this rule will actually apply once implemented. Of the three criteria, the one that we presume will most often be utilized is the prescheduled appointments. It is not likely that many aliens will suddenly obtain legitimate documentation and, if they were able to do so, they likely would not be applying for asylum but would be entering on a type of visa. This is an important distinction because credible fear

[29] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).
[30] Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 2877 (Feb. 5, 2021).
[31] Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (Final on May 16, 2023)(to be codified at 8 C.F.R. parts 208 and 1208).
[32] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750-11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).

procedures would not apply to an admitted alien (i.e. one that actually has a valid authorization). The third criterion may be used more often than the first but it is unclear to the extent that an alien would avail themselves of protection in Mexico and other nations in Central and South America. Whether they are being smuggled to the United States or make the journey on their own, the lack of resources and familiarity with the law will also make this criterion rarely met.

The rule is clearly encouraging aliens to use the second criterion. A prescheduled appointment through the CBP ONE App is the most available option for aliens with access to smart phones or other technology allowing them to contact the system. However, even this criterion is waived if the alien can demonstrate that "it was not possible to access or use the…system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle."[33] In essence, everything must align perfectly for this criterion to be the basis for the presumption of ineligibility. Relying on technology is itself a risky proposition as factors such as bugs within the app or lack of available cellular service or a reliable internet connection could all hamper an alien's ability to successfully schedule an appointment. Additionally, while we do not have statistics on literacy rates of migrants, it would be fairly common to find migrants without a strong grasp of the English language. If language and literacy are included as prerequisites, this will likely include a far larger population of migrants who would overcome the rule's presumption. Lastly, the catchall of "other or ongoing and serious obstacle" is left undefined in the regulatory text. As asylum officers and immigration judges will be trained on identification of the presumption, leaving a catchall which will seemingly be within the discretion of the adjudicator will allow virtually any reason to pass muster. This will result in the presumption being raised against hardly any alien crossing into the United States.

For those few aliens against whom the presumption will be raised, the rule has fashioned it as a rebuttable presumption. Again, the exceptions and now the rebuttals swallow the rule itself. An alien may rebut the presumption when proving that the alien has a medical emergency, "faces an imminent and extreme threat to life or safety," or meets the statutory definition of trafficking victims.[34] Of the three, the most concerning is the threat to life or safety. It is well-established that the trek to the United States is dangerous with more migrants killed or kidnapped each year. The dangers of the journey are further exacerbated with the influence of cartels and other criminal organizations that view smuggling migrants

[33] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11750 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).
[34] *Id*.

as a for-profit business without regard to their safety. From FY17 through FY21, CBP has reported over 1,700 migrant deaths.[35] FY21 had the most in a single year with 568 deaths.[36] Additionally, in that same time period, Border Patrol rescued over 8,400 individuals.[37] FY21 again saw the most rescues in a single year with 3,423.[38] These numbers only represent the deaths and emergencies reported by CBP, not other federal, state, and local agencies and it is unknown how many bodies have never been discovered. The journey to the southern border of the United States is inherently a journey where an alien will face extreme threats to life and safety from beginning to end. To add this as an exception is to exempt the entire population of migrants that have traveled with the assistance of smugglers and other criminal enterprises.

While the rule claims to disincentivize illegal border crossers, the Department's provisions have instead created additional incentives to make the perilous journey either as unaccompanied children or with children in tow. In addition to the fact that the NPRM does not apply to unaccompanied children, the Department of Justice rule requires granting asylum despite ineligibility in an effort to preserve family unity. In a relevant portion, the Department of Justice's regulation states that "[w]here a principal asylum applicant is eligible for withholding…and would be granted asylum but for the presumption…and where an accompanying spouse or child …does not independently qualify for asylum or other protections…the presumption shall be deemed rebutted."[39] Caselaw has long held that grantees of withholding of removal cannot receive derivative benefits for their spouses and children.[40] This provision seeks to sidestep that issue by granting full asylum status to the principal and family even if the principal alien cannot otherwise rebut the presumption.

Parole Abuse

While the Department claims that a lack of available pathways has made the aforementioned rules necessary, that lack has not stopped the Department from abusing its parole authority. For a section of law meant to be used sparingly and in exceptional circumstances, the Department has relied heavily on its parole powers

[35] U.S. Customs and Border Protection, *Border Rescues and Mortality Data* (Feb. 6, 2023), https://www.cbp.gov/newsroom/stats/border-rescues-and-mortality-data.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Circumvention of Lawful Pathways, 88 Fed. Reg. 11704, 11752 (proposed Feb. 23, 2023) (to be codified at 8 C.F.R. parts 208 and 1208).
[40] *Matter of A-K-*, 24 I. & N. Dec. 275 (BIA 2007).

to permit aliens to enter the counter *en masse*, many without a notice to appear before an immigration judge. Section 212(d)(5) of the INA authorizes parole of aliens "into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit…"[41] Additionally, the legislative history of parole authority, cited by the former INS in its initial regulation, makes clear that the intent was to exercise the authority in a narrow and restrictive manner. The original rule stated:

> The drafters of the Immigration and Nationality Act of 1952 gave as examples situations where parole was warranted in cases involving the need for immediate medical attention, witnesses, and aliens being brought into the United States for prosecution. H. Rep. No. 1365, 82nd Cong., 2d Sess. at 52 (1952). In 1965, a Congressional committee stated that the parole provisions 'were designated to authorize the Attorney General to act on an ***emergent, individual, and isolated situation***, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside the limit of the law.' 5 Rep. No. 748, 98th Cong., 1st Sess. at 17 (1965).[42]

Regardless of the plain language of the statute and the legislative history, parole has become a favorite tool of the Biden Administration. While first used as an alternative to detention, parole programs have subsequently played a large role in artificially decreasing numbers along the border.

When reviewing the Border Patrol monthly disposition and transfer statistics, it becomes apparent that parole was the path of choice to quickly process and move aliens northward. Border Patrol monthly disposition and transfer statistics for fiscal years 2022 and 2023 demonstrate just how commonplace parole has become. While Border Patrol suggestions that the "processing disposition decision related to each apprehension is made on a case-by-case basis…"[43] the raw numbers belie that disclaimer. In fiscal year 2022, parole numbers steadily rose to culminate in over 95,000 paroles granted in September 2022.[44] That trend has

[41] 8 U.S.C. § 1182(d)(5).
[42] Detention and Parole of Inadmissible Aliens; Interim Rule with Requests for Comments, 47 Fed. Reg. 30044 (Jul. 9, 1982) (codified in 8 C.F.R. parts 212 and 235) (emphasis added).
[43] Customs and Border Protection, *Custody and Transfer Statistics FY2023* (May 19, 2023), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics.
[44] Customs and Border Protection, *Custody and Transfer Statistics FY2022* (Nov. 14, 2022), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics-fy22.

continued in this fiscal year as Border Patrol recorded over 130,000 paroles in December 2022.[45]

Moreso than individual aliens, the Department has gone farther astray as it has implemented parole programs, contrary to law, for nationals of certain countries. Beginning in October, 2022, the Department announced that it was utilizing new pathways to "create a more orderly and safe process for people fleeing the humanitarian and economic crisis in Venezuela."[46] This was augmented in January, 2023, when the Department announced expanded parole programs for nationals of Nicaragua, Cuba, and Haiti.[47] The program permits nationals of those countries, and their immediate relatives, to seek parole when sponsored by someone with lawful status in the United States. It is worth noting that the sponsor need not be a relative of the beneficiary.

While the previous administration did end parole programs, such as the Central American Minors ("CAM") program, it is undeniable that some parole programs continued to exist and operate. These programs were far more limited in scope. The Filipino World War II Veterans Parole Program, the Haitian Family Reunification Parole Program, and the Cuban Family Reunification Parole Program only account for a fraction of the number of paroles granted by the Biden Administration in just a single month. Additionally, the Cuban Family Reunification Parole Program stems from the Cuba Accords, something that cannot be said about the other countries currently enjoying broad parole.

The result of these parole programs was a drop in border numbers and a marked decrease in parole utilized by Border Patrol. This is all smoke and mirrors however as it is supplanting one form of illegal entry for another. This is not to suggest that parole is akin to an illegal entry but a recognition that parole usage in this fashion, is unlawful.

The Legal Immigration Backlog

This committee is well aware of the vast number of pending matters presently before USCIS. As of December 31, 2022, USCIS reported a pending

[45] Customs and Border Protection, *Custody and Transfer Statistics FY2023* (May 19, 2023), available at: https://www.cbp.gov/newsroom/stats/custody-and-transfer-statistics.

[46] Dep't of Homeland Sec., *DHS Announces New Migration Enforcement Process for Venezuelans* (Oct. 12, 2022), available at: https://www.dhs.gov/news/2022/10/12/dhs-announces-new-migration-enforcement-process-venezuelans.

[47] Dep't of Homeland Sec., *DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes* (Jan. 5, 2023), available at: https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and.

caseload of 8,841,152 matters. While the agency claims to want to reduce this number, actions speak louder than words. It was recently reported that USCIS adjudicators were being shifted from their assigned work in order to support operations along the southwest border.

While the extent of this shift is still relatively unknown, it is clear that any shift will have significant consequences for the adjudication of affirmative asylum cases as well as applications and petitions for immigration benefits. It is also important to remember that the latter group pays the fees that keep USCIS operational. Essentially, USCIS is taking resources away from the adjudications that fund the agency and thereby applicants for benefits are primarily funding, not their own adjudications, but the adjudication of credible fear matters along the border.

Conclusion

The Department of Homeland Security has taken many measures in the past two and a half years aimed at addressing the border crisis however it appears that no one thought to simply enforce the law as written. In an effort to remove barriers and to create a subjectively orderly system, the Department has conflated law and policy and ensured that when the two were in conflict, that policy won the day. The memos that undermine grounds of inadmissibility and removability, the rules that undermine congressional action and established authorities, and the parole programs that are simply incongruous with the law paint a clear picture. The Department has, through its own actions, created the worst border crisis in American history. A return to the rule of law is long overdue and it is incumbent upon Congress to demand that corrective action be immediately taken.

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Testimony by Rodney S. Scott, for House Homeland Security Committee Hearing, "Open Borders, Closed Case: Secretary Mayorkas' Dereliction of Duty on the Border Crisis." June 14, 2023

Chairman Green, Ranking Member Thompson, Members of the committee, good morning and thank you for inviting me to testify before you.

I am appearing before you to ensure that you and the American people have an opportunity to understand that the chaos at our southwest border, and the subsequent national security vulnerabilities and consequences are a direct result of informed and intentional decisions made by the Biden administration. The chaos at our borders is not a reflection on the dedicated career government personnel. The career professionals that make up DHS, and specifically US Customs and Border Protection (CBP), including the US Border Patrol (USBP), deserve our praise and admiration. I am confident that they do everything they can each and every day to secure our borders and protect America even as this administration undermines their efforts.

The information and professional assessments that I provide are grounded in nearly three decades of experience as a career Border Patrol agent and my firsthand experience working in the Biden administration, as Chief of the US Border Patrol, until I retired in August 2021. For much of my career I was honored to participate in the transition from an uncontrolled chaotic southwest border to a border that was increasingly secure. Unfortunately, that progress was reversed by the Biden administration. The informed and intentional decisions made by the Biden administration directly resulted in the predicted disintegration of border security into the chaos that now threatens to be a new normal.

The current administration, supported by a lot of media, is misleading America by asserting that they inherited a border in shambles, surges in immigration like we are experiencing are normal and that they are solving the border "challenge" by allowing aliens, without any legal immigration documents, to enter the US through official Ports of Entry. The aliens are allowed to schedule an appointment via the CBPone app, assert a fear claim and then get released with Notice to Appear in immigration court in a few years. Or they can apply for a program that relies on an expanded use of Parole authority to get into the country without immigration documents. This parole program is arguably illegal, because in part, the process lacks the individual case by case determination as required by law.

Let me be clear, the crisis at our border is still raging and poses both immediate and strategic national security threats to America. Despite the current administration's claims, just because US Border Patrol encountered 11,000 illegal aliens on a single day with Title 42 in place does not mean that arresting 3,500 illegal aliens a day under Title 8 is a good day. First, 3,500 arrests each day continues to overwhelm USBP capabilities and empowers the cartels to control who

and what enters the US. For context, from fiscal years (FY) 2015 through 2020, USBP averaged approximately 1,250 arrests each day. FY15 and FY17 averaged below 1,000 arrests each day. Over the course of those years, USBP was improving situational awareness and improving interdiction effectiveness. This progress ended and chaos ensured with the signing of several executive orders and public announcements on, and following January 20, 2021. The message that was heard around the world was that the US borders are open and even those without legal immigration documents will be allowed to enter the United States. As you know, this resulted in over 6 million encounters[1] and over 1.4 million known got-a-ways[2].

Second, these numbers and comparisons alone still fail to adequately demonstrate the severity of the border crisis or the daily consequences of mass migration. Simple encounter and arrest numbers fail to portray how much time it takes to arrest, search, transport, and then process each individual. These numbers also fail to show the thousands of hours that agents spend transporting sick and injured aliens to local hospitals and then providing 24/7 security monitoring until the alien is released.

Thirdly, these numbers fail to adequately portray the loss in situational awareness as agents are not patrolling the border while they routinely detain and then transport large groups of illegal aliens out of remote areas, often three aliens at a time depending on the terrain and the vehicle capacity. Nor do they account for the number of agents required to monitor and provide care during administrative processing. Further, these numbers do not address the loss in agent effectiveness that occurred when the border wall system, to include the surveillance technology package, was terminated leaving hundreds of miles of border without persistent surveillance capability and sporadic gaps in border barrier. These numbers also fail to show how many human trafficking incidents went undetected or measure the loss of intelligence because agents and officers do not have time to conduct thorough interviews.

Fourthly, these numbers do not address how many people got into the US undetected or the volume of narcotics that was successfully smuggled to your city. If you are unaware, the Got-a-ways reported by USBP are only the known got-a-ways. They were detected but there were no agents left to interdict them. An illegal entry unseen is an illegal entry uncounted!

Additionally, these numbers also fail to acknowledge the impacts associated with the increased volume of undocumented migrants being funneled into our ports of entry. By redirecting CBP Officers to conduct civil immigration processing the wait times for legal trade and travel are increased. This further disrupts our supply chains and increases the cost of imported goods. Even more importantly, it also reduces the time officers have to conduct thorough inspections and interviews to identify potential threats. I would like to remind everyone that this is their real job. Nineteen (19) terrorists carried out the 9/11 attacks because the 20th terrorist was denied entry into the US by an alert officer that had time to conduct an effective inspection interview.

[1] Nationwide Encounters | U.S. Customs and Border Protection (cbp.gov)
[2] Public statements by USBP Chief Raul Ortiz

I would also like to remind everyone that the majority of Fentanyl and other illicit narcotics, readily available in every state across our nation, originated outside the US. Every agent and officer taken away from inspection and patrol duties decreases our ability to interdict these poisons before they can make it to your families, friends, or neighbors.

I started my testimony with a strong assertion that I believe the chaos at our southwest border and the national security vulnerabilities and consequences are a direct result of informed and intentional decisions made by the Biden administration. I do not make this assertion lightly. As Chief of the US Border Patrol, my staff and I engaged directly with the transition teams prior to the inauguration, as well as President Biden's appointed personnel following the inauguration.

In two very brief direct engagements with Secretary Mayorkas, he acknowledged that the significant numbers of illegal entries were overwhelming Border Patrol capabilities and was not sustainable. He also acknowledged his prior experience in DHS and that he understood there must be consequences for illegal entry to stem the flow. The first engagement was a senior DHS leadership call with the Secretary and the second engagement was at a meeting with border Sheriffs in El Paso, TX. Unfortunately, I quickly learned that the Secretary's words and action were routinely very different. Routine conversations, formal and informal operational guidance, combine with the public actions and statements of Secretary Mayorkas and other Biden administration officials, quickly resulted in the conclusion that the administration had no intention of securing the border in any meaningful way despite the legal requirements to do so.

Biden administration personnel made it very clear in every engagement that their focus was on expediting immigration processing to increase throughput and open new opportunities for migrants to enter the US. This was very consistent with the statements made during the presidential campaign. My personal interactions also made it clear that many of the political appointees did not believe that millions of unknown, unvetted foreigners illegally entering the US were a problem. The only issue that the Biden administration appointees wanted to discuss was how to avoid the optics of large numbers of aliens, especially unaccompanied alien children, being detained in government facilities.

Nonpartisan career government personnel, to include myself, advised the Biden administration repeatedly that the removal of consequences for illegally entering the US, reimplementing catch and release, and very publicly terminating the construction on the border wall system would undoubtedly result in an influx of illegal aliens that would overwhelm US capabilities and empower the cartels. The Biden administration refused to acknowledge the national security threats that increase proportionately with any increase in illegal immigration and/or the fraud in our asylum processes. Despite being briefed and provided written warnings, the Biden administration refused to acknowledge that mass illegal immigration transfers control of the US border directly to the cartels.

From day one, political leadership in the Biden administration ignored career professionals and increasingly made policy decisions that resulted in thousands of aliens being released into the

US. As predicted, the volume of illegal immigration rapidly increased, overwhelmed Border Patrol and effectively transferred control of our southwest border to the Mexican drug cartels.

I watched the border security gains that were made over three decades vanish and the safety of border communities spiral backwards. Policy makers must understand that this is not simply an immigration issue. This is a national security threat. Cartels use illegal aliens to overwhelm law enforcement creating controllable gaps in border security. These gaps are exploited to smuggle anything they want into the US. To think that well-resourced terrorist networks and hostile nations are not exploiting this vulnerability is naive.

Prioritizing immigration processing over enforcement also means that deployed agents are spread so thin that they often lack the capability to make an interdiction, even after an illegal entry is detected. This does not include the unknown gotaways along the hundreds of miles of border that lack persistent surveillance and go unpatrolled for days and even weeks. In my professional assessment, as a direct result of decisions and actions taken by the Biden administration and specifically Secretary Mayorkas, U.S. Border Patrol has lost the ability to know who and what is entering our homeland.

Border security is national security. My firsthand experiences taught me that border security and immigration policy are two distinctly different, yet interrelated issues. Border security is simply knowing and controlling who and what enters our homeland. Immigration and customs laws and policies are irrelevant if you cannot control the initial entry.

I realize that some people see the border security and immigration enforcement decisions of this administration, and specifically Secretary Mayorkas, as simple policy differences. I do not agree with that opinion. Policy is how you carry out your duties and responsibilities under the law. Our government officials should not be allowed to use policy differences as an excuse to ignore the law. By law, the Secretary of Homeland Security is required to take action to prevent the entry of illegal aliens and to secure the border. I argue that even if unattainable the law requires the Secretary to at least try to meet these objectives.

I believe that Secretary Mayorkas and subordinate political appointees have taken actions and made public statements clearly demonstrating that the Secretary has made informed decisions to ignore legal responsibilities. Instead, he has chosen to dedicate the resources of the Department to provide care, feeding, and even facilitating the movement of aliens that entered the US illegally. I would argue that once again his actions do not match his words and go against his own enforcement prioritization guidance issued on September 30, 2021. This guidance states that Department resources should be focused on the most significant national security and public threats. Despite issuing that guidance, he has chosen to expend a significant portion of the resources and capabilities of the Department to process civil immigration cases at the expense of addressing significant national security and public safety threats at the border.

I have heard many people of both parties rightly argue that we have never had enough resources to detain and prosecute everyone that enters the US illegally, and that this is why we must leverage prosecutorial discretion. While on the surface this statement is true, it is also misleading, as it leaves out some very important facts. Prior to Secretary Mayorkas taking the helm at DHS, prosecutorial discretion was heavily complimented by deterrence strategies and effective polices that decreased the total number of illegal entries. As illegal entries decreased the percentage of law violators that could be detained and prosecuted increased, This acted as a further deterrent. These cascading effects resulted in improved border security year over year until January 20, 2021

I believe the intent of the law is clear even in areas where the means and methods are not clearly defined. My personal observations and experience have led me to believe that Secretary Mayorkas has intentionally ignored legal responsibilities and empowered his subordinates to do the same. Specific areas of concern are outlined below.

Secretary Mayorkas has ignored his duty to prevent aliens from illegally entering the United States as required by law.

> *8 USC 1103 (a)(5) Secretary of Homeland Security… He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.*

Secretary Mayorkas has ignored his duty and failed to take any meaningful action towards establishing operational control of the US borders as required by law.

> *The Secure Fence Act of 2006 states in part that:*
>
> *…the Secretary of Homeland Security shall take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States…*

Biden administration personnel demonstrated contempt for the Impoundment Control Act of 1974 and openly discussed methods to ignore the Appropriations Acts that authorized and funded border wall construction. They prevented any meaningful construction, while creating the appearance that work was being done to avoid an Impoundment Act violation.

The Presidential Proclamation[3] that paused border wall construction was issued on January 20, 2021. The Proclamation included a required review of each project and that a submission of a

[3] Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction | The White House

plan within 60 days. It also included the following statement,

> *"while providing for the expenditure of any funds that the Congress expressly appropriated for wall construction, consistent with their appropriated purpose. The plan shall be developed within 60 days from the date of this proclamation. After the plan is developed, the Secretary of Defense and the Secretary of Homeland Security shall take all appropriate steps to resume, modify, or terminate projects and to otherwise implement the plan."*

Based on statements made during the 2020 presidential campaign, I had anticipated this type of guidance and directed my staff to create a database with details of every wall project. The database would include, but not be limited to, the origination of the specific operational requirement, funding source, construction status, and any foreseeable questions that the new incoming administration may ask. That database was completed well before the Presidential Proclamation was issued. This information was presented and made available to Secretary Mayorkas and several Biden administration personnel on multiple occasions. Yet, to my knowledge, no meaningful construction of Congressionally appropriated wall projects has been resumed.

While the statements of Secretary Mayorkas and subordinate political appointees usually include at least one small fact to evoke understandable compassion for the plight of migrants, I have yet to hear a single statement or see any action toward protecting Americans or securing our borders. I acknowledge and champion our responsibility as humans to help others, but Secretary Mayorkas oversees the **United States** Department of Homeland Security, with significant capabilities and billions of tax dollars in appropriated funds, that are supposed to be used to protect Americans, and America. This administration is clearly not doing that.

I look forward to answering your questions.

Rodney Scott
Retired – Chief U.S. Border Patrol
Honor First!

HOUSE HOMELAND SECURITY COMMITTEE

OPEN BORDERS, CLOSED CASE: SECRETARY MAYORKAS' DERELICTION OF DUTY ON THE BORDER CRISIS

JUNE 14, 2023

WRITTEN TESTIMONY OF CHAD WOLF
EXECUTIVE DIRECTOR, CHIEF STRATEGY OFFICER, & CHAIR OF THE CENTER FOR HOMELAND SECURITY & IMMIGRATION
AMERICA FIRST POLICY INSTITUTE

Chairman Green and Representative Thompson:

Thank you for the opportunity to testify before the House Homeland Security Committee.

By any objective measure or metric, the U.S. is facing the worst humanitarian and national security crisis along our southern border in our Nation's history.

As someone who understands the difficulty and complexity of running the Department of Homeland Security (DHS), I do not state this lightly. It is clear to me and millions of Americans that the Biden Administration has failed in its constitutional duty to "take Care that the [immigration and border security] Laws be faithfully executed."[1] This is a dereliction of duty.

I have reached this inescapable conclusion after having had the distinct privilege of serving at DHS at its inception under President George W. Bush and throughout President Trump's Administration, including the last 14 months as Acting Secretary of Homeland Security. For the last 27 months since I left office, I have closely followed the national security and humanitarian crisis unfolding along the southern border and have been publicly critical of the Biden Administration's policies and operations. That criticism is not expressed because we are from different political parties but rather, it comes from my own experience as Acting Secretary and the apparent and deliberate destruction of what was, very recently, the most effective border security in recent memory.

One of my philosophies as Acting Secretary was based on one simple axiom: if you do not have borders, you do not have a country. Sovereignty does not exist if you are not sovereign over your own borders—territorial, maritime, or aerial.

To that end, today's border security system is unrecognizable from the America First border security policies of the Trump Administration or even the border security apparatus in place during the administrations of Presidents Clinton, Bush, and Obama. In all candor, the Biden Administration is the first administration of either political party to actively take steps to diminish the security along our southern border.

In contrast, under President Trump's leadership, a talented group of professionals and I helped implement a body of policies that established the most secure southern border in my lifetime. In addition to building the most advanced border wall system, we put in place across-the-board policies that

[1] U.S. CONST. ART. II, § 3 (cleaned up).

deterred illegal immigration, disrupted the Mexican cartels, disincentivized the flow of deadly fentanyl, and enforced the laws enacted by Congress.

In fact, when confronted with caravans of illegal aliens surging to the southern border in 2018-2019, we were honest with the American people that it was a crisis. So, we went straight to work to restore order and maintain America's sovereignty.

The Trump Administration utilized previously untapped legal authority found in section 235(b)(2)(C) of the Immigration and Nationality Act (INA) to put in place the highly successful Remain in Mexico policy, or Migrant Protection Protocols;[2] President Trump also struck historic Asylum Cooperative Agreements with the Northern Triangle countries to redirect illegal aliens to seek asylum closer to their home country under the authority provided by section 208(a)(2)(A) of the INA.[3] The Trump Administration also issued a third-country transit regulation under section 208(b)(2)(C) of the INA to thwart asylum forum shopping, bolstered internal relocation guidance for adjudicators,[4] streamlined asylum cases at the border to speed up deportations of those found ineligible, and restored the definition of refugee[5] to Congress's intent of requiring persecution by a government actor on one or more of the protected grounds. No Presidential Administration can do more under existing law—and none should do any less.

These policies were necessary because economic migrants and human traffickers were exploiting the loopholes in our laws by making fraudulent asylum claims to block their quick deportation under expedited removal.[6] Only between 10-15% of illegal aliens apprehended at the southern border who claim asylum actually qualify for this humanitarian relief.[7] The rest, to put it mildly, are trying to game the system. Under the Immigration and Nationality Act (INA), they need to—but they cannot—satisfy the appropriately rigorous "well-founded fear of persecution" standard in order to obtain humanitarian relief.[8] Such artful circumvention of the law is the same as breaking the law. And every President has a *bona fide* duty to stop the lawbreakers. Anything short is a contravention of the laws Congress has gone to all the trouble of enacting—repeatedly.

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[2] 8 U.S.C. 1225(b)(2)(C).
[3] 8 U.S.C. 1158(a)(2)(A).
[4] *See* 8 C.F.R. 208.13(b)(3).
[5] 8 U.S.C. 1101(a)(42).
[6] 8 U.S.C. 1225(b)(1)(A)(i).
[7] *See* DEPART OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Asylum Decision and Filing Rates in Cases Originating with a Credible Fear Claim, *available at* https://www.justice.gov/eoir/page/file/1062976/download.
[8] 8 U.S.C. 1101(A)(42).

The Trump Administration utilized the fullest extent of its legal authority to combat this asylum fraud by making aliens wait in Mexico or detaining them in the U.S., the only two options permissible under section 235 of the INA and, importantly, quickly returning them when an immigration judge denies their claim. We never forgot the violence that illegal immigration cruelly inflicts on defenseless women and children, who are raped, trafficked, and scarred for life by the lawbreakers.

The evidence speaks for itself. During the Trump Administration: fraudulent asylum claims declined, those who qualified got humanitarian relief faster, lives were saved as migrants stopped taking the dangerous journey north when they realized they would not be allowed into American communities.

In stark contrast, today we see a border in chaos and crisis because the Biden Administration ideologically and arbitrarily **dismantled ALL of these successful policies** on Day One and sidelined career Border Patrol experts who continued to warn that a historic surge of illegal aliens would overwhelm the border in the absence of any deterrent policies. Political correctness and rank ideology supplanted common sense and the clear command of our immigration laws.

And even as the warnings of career Border Patrol experts came to pass, the Biden Administration sat idly by and did little to curtail this crisis. The result is that since President Biden was sworn into office, **nearly 5.5 million illegal aliens**—and counting—have unlawfully come into our country plus at least another 1.5 million "gotaways" who completely bypassed the Border Patrol and made it into American communities.[9]

To be clear - the laws didn't change between administrations, just the refusal of the current one to follow their legal obligations. Instead, they embraced destructive and unlawful policies that have made American communities less safe and enriched the Mexican cartels to new heights because open borders is a lucrative business.

But the abuse of the law doesn't end there. Here are some additional, non-exhaustive examples:

- **Nationwide Catch-and-Release:** The Biden Administration *intentionally* decided to ignore its legal mandate to detain illegal aliens or make them wait in Mexico throughout their immigration court proceedings. Instead, this Administration re-implemented the

[9] *See* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

dangerous catch-and-release policies ended by President Trump and instead began mass releasing illegal aliens into American communities.

Federal District Court Judge Wetherell struck down this practice, writing "The Court finds in favor of Florida because, as detailed below, the evidence establishes that [the Biden Administration] have effectively turned the Southwest Border into a meaningless line in the sand and little more than a speedbump for aliens flooding into the country by prioritizing 'alternatives to detention' over actual detention and by releasing more than a million aliens into the country—on 'parole' or pursuant to the exercise of 'prosecutorial discretion' under a wholly inapplicable statute—without even initiating removal proceedings."[10]

- **Issuing Notices to Report (NTRs)**: Unable to process the volume of illegal aliens out of DHS custody fast enough under catch-and-release, DHS early on under the Biden Administration resorted to issuing Notices to Report—essentially an honor-system document that asks illegal aliens to self-report to a local Immigration and Customs Enforcement (ICE) office when they reach their destination.

  Unsurprisingly, few reported and now these illegal aliens lack immigration court dates because they were not issued a Notice to Appear (NTA), the formal charging document. This means that removal proceedings will not even begin until ICE encounters them in the future, further prolonging the amount of time these illegal aliens remain in the U.S. This process was discontinued for some time but as the administration scrambled to deal with the expiration of Title 42, they attempted to resume NTRs.

  Again, the court blocked the implementation of this policy, holding that it "appears that DHS is preparing to flout the Court's order," noting that this policy "sounds virtually identical" to the catch-and-release policy he blocked in March 2023. The judge further explained, "In both instances, aliens are being released into the country on an expedited basis without being placed in removal proceedings and with little to no vetting and no monitoring."[11]

- **Canceling Notices to Appear (NTAs)**: For those illegal aliens who received NTAs, their court dates are multiple years down the road because the volume of illegal aliens the Biden Administration allowed

[10] State of Florida v. U.S., Case No. 3:21-cv-1066-TKW-ZCB (N.D. Fl. Mar. 8, 2023).
[11] State of Florida v. Mayorkas, Case No. 3:23-cv9962-TKW-ZCB (N.D. Fla. May 11, 2023).

into the U.S. has overwhelmed the immigration courts. Instead of ending catch-and-release and reinstating deterrence policies, the Biden Administration unilaterally canceled thousands of NTAs which removes them from the immigration court backlog. These illegal aliens still lack a lawful right to be in the U.S. and this unlawful action by the Biden Administration makes their future deportation nearly impossible.

As a broader point, such travesty of the Rule of Law dishonors not only our Nation and our law-abiding citizens—it also makes light of the sacrifices borne by countless *lawful* immigrants who patiently stood in line to come to this country the legal way. This Administration's message could not be more unambiguous—those who waited their turned, filled out applications, and paid fees for visas were foolish for obeying our immigration laws. The Biden Administration tells lawful immigrants that the enormous sacrifices they and their families made in coming to America by following the law count for nothing. When the current Administration arbitrarily excuses the contravention of our laws by some, it is diminishing and demeaning to us all.

- **Nullifying Interior Enforcement**: On Day One, the Biden Administration issued a 100 Day deportation freeze for all illegal aliens, including those with criminal convictions. Federal District Judge Drew Tipton enjoined this non-enforcement policy on the grounds that it was "arbitrary and capricious" and that the policy "fails to provide any concrete, reasonable justification for a 100-day pause on deportations."[12] DHS has since issued "enforcement" priorities that exempt 99% of illegal aliens from the threat of deportation. The Biden Administration has sidelined ICE agents and effectively accomplished the goals of the extremist "Defund ICE" movement.

- ***De Facto* Amnesty**: President Biden campaigned on granting amnesty to all illegal aliens—a policy that even the previous Congress rejected. But the President was undeterred. Ignoring the Constitution's grant of the legislative power to the *Congress* (and not to the President), he decided to achieve in practice what Congress did not permit him to achieve in principle. As a result, the DHS Secretary implemented a *de facto* amnesty when he declared that being here unlawfully is not grounds for removal. The obvious remedy corresponding to a violation of the law was arbitrarily taken off the table.

  This edict directly and incontestably contradicts the law and mocks our Nation's time-honored immigration court system. In keeping with that

[12] Texas v. United States, Civil Action No.: 6-21-cv-00003 (S.D. Tex. Feb. 24, 2021).

policy choice, the current Administration's claims of prioritizing limiting resources are disingenuous, perhaps flatly risible. After all, there are over 1 million aliens with final orders of removal who are still in the U.S.; yet, the Biden Administration has removed the *lowest* levels of illegal aliens, including criminal aliens, in modern history.[13]

- **Giving USCIS Asylum Officers Jurisdiction over Border Asylum Claims**: Through an unlawful regulation, the Biden Administration has given U.S. Citizenship and Immigration Services asylum officers the ability to decide the asylum claims of illegal aliens apprehended at the border. Congress created DHS through the Homeland Security Act of 2002, with much—but not all—immigration jurisdiction that was held by the former Immigration and Naturalization Service within the Department of Justice transferred to DHS.[14] By this authorizing statute, only immigration judges have the legal authority to hear asylum claims of aliens in removal proceedings as this authority was not delegated to DHS.[15] It is apparent that the Biden Administration made this unlawful move under the belief that USCIS employees will be more like to grant relief. DHS data shows that USCIS asylum officers are granting asylum at nearly twice the historical rate of immigration judges.[16].

- **Categorical Parole**: Perhaps the most egregious example of violating the law is the DHS Secretary's unlawful use of the parole authority. Section 212(d)(5) of the INA could not be clearer that the right to grant this kind of parole comes from a remarkably narrow sliver of statutory authority, only allowable on a case-by-case basis for: (1) urgent humanitarian reasons or (2) significant public benefit.[17] DHS has ignored the statutory requirements and turned this limited authority into an override of the legal immigration system.

  You know the law is not in your favor when you suddenly discover a slender reed in some old statutory provision that, *only* when it is totally divorced from context, gives you the slightest hope. That's why, as the Supreme Court reminded us less than a year ago in *West Virginia v. EPA*, when the Executive Branch "claims to discover in a long-extant

[13] See U.S. Immigration and Customs Enforcement, ICE Annual Report Fiscal Year 2022, fig. 20 (Dec. 30, 2022), available at https://www.ice.gov/doclib/eoy/iceAnnualReportFY2022.pdf.
[14] Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002).
[15] *Id.*; *see also* Arthur, Andrew & Law, Robert, Public Comment Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protections by Asylum Officers (Oct. 18, 2021), *available at* https://cis.org/sites/default/files/2021-10/JNPRM_Asylum_Procedures_FINAL_submitted_10-18-2021.pdf
[16] *See* Department of Homeland Security, Asylum Processing Rule Cohort Reports, *available at* https://www.dhs.gov/immigration-statistics/special-reports/asylum-processing-rule-report
[17] 8 U.S.C. 1182(d)(5).

statute an unheralded power representing a transformative expansion in its regulatory authority," that's usually a sign of desperation because the President and/or the agency know in their heart of hearts that they do not have the statutory authority they are claiming.[18] Everyone else knows it as well. As if that Supreme Court prescription wasn't enough, the Court in *West Virginia* also said that when the Executive suddenly "locate[s] [its] newfound power in the vague language of an ancillary provision of the [law]," its claimed authority is on conspicuously shaky, and presumptively unsound, ground.[19]

So too here. The mass parole system devised by the Biden Administration turns our immigration law framework on its head. After all, statutes have to be interpreted, to the extent possible, as a harmonious whole, so why would Congress have enacted the rest of the INA if Presidents, operating whimsically, could circumvent it by issuing paroles *ad nauseam*? This question, like all such questions, answers itself.

Just think: The parole program for Cubans, Haitians, Nicaraguans, and Venezuelans allows up to 360,000 illegal aliens per year to fly into American communities and the separate unlawful program using the CBP One app near the southern border are not new, safe, lawful pathways but a diversion of illegal aliens from between ports of entry to the ports of entry. It is clear that these illegal categorical parole programs are designed to hide the optics of the border crisis from the American people.

What is more, this Administration's abuse of the parole authority isn't limited to the border. After the Biden Administration's disastrous withdrawal from Kabul DHS unlawfully paroled into the U.S. nearly 100,000 unvetted Afghans, most of whom were military-aged males.

You needn't take my word for it. Even the Inspectors General of both DHS and the Department of Defense have issued scathing reports on the national security vulnerabilities the homeland has been exposed to because of this reckless, senseless, dangerous, and of course unlawful decision.[20] There are a number of instances where these Afghan parolees have committed heinous crimes, include rape.

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[18] 142 S. Ct. 2587, 2610 (2022) (cleaned up and alterations made).
[19] *Id.* (cleaned up and alterations made).
[20] *See, e.g.*, U.S. DEPARTMENT OF DEFENSE INSPECTOR GENERAL, Evaluation of the Screening of Displaced Persons from Afghanistan, Report. No. DODIG-2022-065 (Feb. 15, 2022), *available at* https://media.defense.gov/2022/Feb/17/2002940841/-1/-1/1/DODIG-222-065.PDF.

> By embarking on this nullification of immigration law by executive fiat, the Biden Administration is allowing into the U.S. millions of illegal aliens who do not qualify for a visa and thus creating a subclass of aliens who have no avenue for a legal immigration status and are in perpetual uncertainty and agony. That is not American leadership or humanity at its finest. Instead, this is just cynical, crass treatment by the current cadre of Executive Branch leadership and is the direct result of the Biden Administration's circumventing our border security and immigration laws.

In conclusion, I would suggest that one of the most important duties as the DHS Secretary is to be transparent and honest with the American people about security issues affecting the homeland. It is very clear to me that the current administration is lying to the American people about the severity of the problem, while at the same time absurdly attempting to lay blame on the Trump Administration, on Congress, or some other entity for their failed strategy.

Here is the reality:

- The border is not secure, it is in fact open to illegal aliens by the hundreds of thousands.
- A historic number of illegal aliens – nearly 5.5 million –have been apprehended at the southern border during the Biden Administration with approximately 3 million allowed into American communities—a population larger than every major U.S. city except for New York City and Los Angeles.
- Another 1.5 million observed "gotaways" who bypassed Border Patrol and pose severe national security and public safety threats.
- More than 200 known or suspected terrorists apprehended at the southern border compared to just 11 during the Trump Administration—and these are just the ones caught because they didn't realize we had them in the FBI database.
- The border is effectively controlled by Mexican cartels – who crave the predictability of these policies for their business model.
- More migrants have died during their journey than ever before.
- More Border Patrol agents have been assaulted by so-called asylum seekers than ever before.
- The Biden Administration has lost contact with more than 85,000 children after releasing them to sponsors, according to The New York Times.[21]

[21] Dreier, Hannah, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, NEW YORK TIMES (Feb. 25, 2023).

- The Biden Administration is aware of tens of thousands of children being subjected to abusive work conditions, according to The New York Times.[22]
- And there is no operational control over large portions of the border. This is not just my assessment, but that of outgoing Border Patrol Chief Ruiz and other career U.S. Customs and Border Protection officials when questioned by Congress or in litigation challenging Biden Administration policies.

These are the results of a process the Biden Administration calls "safe, orderly, and humane." But to whom exactly? Not to the migrants dying along the journey; not to the migrants abused, extorted or worse by the Mexican cartels; not to American communities that have been overrun by this influx of illegal aliens and lethal fentanyl; and not to Border Patrol officers who have been assaulted and have pleaded with political leadership to solve this crisis.

Instead, the process that has been created over the last two years can be more accurately described as **dangerous, corrupt, and inhumane**. After 9/11, DHS was created to secure the homeland and protect our Nation's citizens. I was there to help get DHS up and running. Yet the actions of the Biden Administration have done the opposite of adhering to the DHS mission by eroding our institutions and diminishing the Rule of Law. **This is a crisis by design**.

Finally, a singular quote from Supreme Court Justice Louis Brandeis' from almost a century ago still rings true today:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperil[]ed *if it fails to observe the law scrupulously.* Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. … *If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.*[23]

[22] Dreier, Hannah, *As Migrant Children Were Put to Work, U.S. Ignored Warnings*, NEW YORK TIMES (Apr. 17, 2023).
[23] 277 U.S. 438, 485 (dissenting opinion) (emphases added).

Unfortunately, this is a message lost on the Biden Administration. Anarchy, I regret to say, is what we see today with the strategic refusal to implement our border security laws. Unless we course-correct immediately, our Rule of Law is in somber danger of being lost forever into the oblivion of history. That *is* a message worth remembering, and re-committing ourselves to, if we are to remain a nation of laws. Or even a nation at all.

For the reasons cited here and for others I am happy to discuss, it is my professional opinion that **the Biden Administration has been derelict in its duty** to faithfully execute the law, as written, and to protect American communities.

Thank you and I look forward to answering your questions.